II

I shall now discuss briefly the nature of the causal effects of precedents upon judicial decisions and the justifications for those effects. One frequently hears laymen scoffing at the respect which courts pay to precedents and sometimes displaying a lamentable ignorance both of the nature of the influence which precedents have on the law and of the reasons for the existence of that influence. The influence of past example on human action pervades all human conduct and endeavor at all times. That influence is fundamental. It occurs through instinctive as well as intelligent processes and sometimes runs to unreasonable extents. This sort of influence, then, is not peculiar to the field of law. Men in business, in social matters, in religion, in scientific pursuits, and in play, follow precedents and learn from precedents. Progress would not continue and human life could not long exist if it were not for the influence which precedent has on thought and instinctive action.

Comprehending these facts, let us observe some of the reasons for the influence which precedent has had and does have on the decisions of our courts. Conservatism—human inertia against change—is one cause of this influence, but a cause which has a diminishing potency as the progress of civilization and knowledge goes on. Today its causal effects on judicial decisions, independently of political theory and the other causes of the influence of precedent, is not greater than on other governmental functions.

When I made an exception of political theory in the preceding paragraph, I had in mind the vague tradition that courts should not break from long and firmly established main courses of decision even to improve the law.[29] Political and philosophical history has induced the wide spread political theory that this sort of work is legislative and the courts have followed the theory although it has hampered progress. On some occasions judges have held themselves bound by its dictates when judicial wisdom and courage would have justified the initiation of needed partial reforms. A full discussion of the historical reasons for this conservative clog on progressive rectification of the law through judicial initiative would require far more time, study, and space than the design of this article permits. I therefore merely indicate it as one phase of the potency which our

[29] I use the phrase "the law" in the sense of sequences of external facts and their concrete legal consequences through the concrete operation of governmental machinery.

courts give to precedents. It is the only common phase logically open to criticism.[30]

The other reasons for the influence of precedents on judicial decisions appeal directly to logic. Knowledge that a particular sort of problem has been solved in a certain way by a court in the past or that facts of a particular sort have been given an ascertained weight in its solution has a natural influence with judges who have a similar problem before them. Not only is this an example to be carefully studied by the judges as offering a possible solution, but the fact that such a solution has been made by others throws some weight in favor of a similar decision. Judges would be extraordinary human beings if they were not influenced to some extent by the expert previous opinions of others who have faced like problems. In this phase, a precedent is of weight whether it is a decision by a court of the same jurisdiction or not. Its force should logically depend on the known ability of the judges who rendered it.

Another and stronger logical justification for the influence of precedents on judicial decisions is that the time of a court would not be used economically if questions like ones which have been decided by it before could be litigated in indefinite number and in full detail without final settlement of the law through the accumulation of previous decisions. Furthermore, although litigation is necessary, it is a drain economically on the parties and, through the use of the courts and other governmental agencies and indirectly in other ways, on the community. If precedents were not given great weight, encouragement to litigate questions of law would be afforded where now discouragement exists because of opposing precedents. As long as the law is unsettled, litigation will not diminish. For these reasons it is sound policy for a court to treat its previous decisions as controlling unless some stronger argument of justice or policy overweighs. The following associated reason is also potent. It is one of the great advantages of civilized judicial administration that people know what to expect from governmental action because of different sorts of conduct. If precedents on common law points and the construction of legislation were not followed, the certainty of predictions of potential concrete decisions of our courts would be greatly diminished. This last consideration varies in logical force with the nature of the problem involved. It is particularly strong in connection with points of property law and commercial law. Titles to

[30] Lord Mansfield's attempts to subvert the theory in practice are familiar to students of the history of our law. In spite of the prevalence of the theory, a vast amount of change and amelioration of the law has been accomplished by the courts—often by the use of legal fictions, and more especially through the extension and influence of equitable jurisdiction and principles. See Maine's Ancient Law, Chapters 2 and 3.

property should be reasonably certain and it should be possible to proceed in commercial matters with assurance concerning legal rights and duties. On some sorts of legal questions, however, this consideration has little logical force. Whenever the problem is such that the certainty of prediction of the potential legal consequences would rarely or never affect or facilitate human conduct, it has slight or no logical weight.

It is difficult to generalize satisfactorily concerning the exact measure of the influence which precedents exert on judicial decisions.[31] That influence varies with the intelligence, intellectual independence, and mental tendencies of the judges, with the nature of the problem before the court, with the clearness and the pertinency of the precedents considered, with the jurisdiction of the courts which rendered them and the legal reputations of their judges, with the repeated accumulated weight of the precedents, with the cogency of the opinions of the judges in the cases used as precedents, and with other matters which might be noticed and catalogued. It was not within my purposes to undertake any such task, but only to call to your attention that precedents individually are not authoritatively compelling on the deliberations of courts as is legislative expression and that they are so collectively only insofar as a somewhat vague political theory concerning the boundaries of legislative and judicial functions make them so. In order to do this, I mentioned the well known facts that courts do not always follow precedents even in their

[31] The antithesis of decision and obiter dictum in legal discussion often puzzles students. An irrelevant remark is easily distinguished from the pertinent reasoning of the opinion in a case, but some of the pertinent judicial generalizations may be limited in later cases and the rejected purport may be classed with obiter dicta. Here we meet again the common linguistic phenomena of ill-defined and shifting usage. The matter is sometimes anxiously argued as though it were of fundamental importance. As a matter of fact it is not. The question which a court faces in dealing with past cases is simply: "What force shall we give this precedent," whether the precedent is the concrete adjudication of a previous case, the ratio decidendi of that adjudication, or some of the broader general expressions of the opinion. A concrete adjudication in point is certainly a more weighty thing to consider than expressions of reasoning in the opinion. On the other hand it may be overruled. The ratio decidendi may be criticised and discarded. Irrelevant obiter dicta generally are not given much weight; but, on the other hand, a well conceived and well expressed generalization, although it was wholly aside from the questions litigated in the case in which it appears, sometimes has been of great influence in the decision of a later case. The exposition of a text writer frequently has a similar precedential force. In short, the problem of the lawyer in dealing with precedents as "authorities" is to determine accurately their potential argumentative influence, and this question can not be helped by a bare division of judicial expression into "obiter dicta" on the one side and "rationes decidendi" on the other, however these terms may be defined. The following matters are of great value in the solution of his problem: an analysis of the bare concrete facts, the questions litigated, the decisions of them, and the adjudication in a concrete case; a determination of the causative importance of the formal reasoning expressed in the opinion; and a critical examination of the inherent cogency of any particular expression concerning the law.

own jurisdictions and sometimes overrule a long line of decisions, and I have just finished indicating the reasons for the force given to precedents by the courts. I desire only to reiterate one more fact in this connection. Judicial reasoning in a previous case, insofar as it can be ascertained, has a precedential force similar to that of a concrete adjudication in point; but its force logically is not as great. Even when a previous decision in point is squarely based upon the statement of a rule or principle in the reported opinion, the generalization indicated by the statement may be criticised as erroneous and amended or entirely discarded. A generalization which has been repeated in many opinions finally may be discredited.[32]

[32] There is little need to contend with intelligent lawyers that judges do and must make law in the sense of determining by juridical processes other than interpretation of previous expressions, the governmental results of concrete events. Even the theorists who adhere to the Blackstonian description of law with variations admit that the law changes and grows under the multiplication of judicial decisions. Some even assert that judges "legislate"—a use of language which implies obscuration of the essential difference between ordinary legislation and the administration of justice between parties. (See: Maine's Ancient Law, 4th Am. Ed., pp. 24-32; note by Pollock idem p. 395; Austin's Jurisprudence, Vol. II, pp. 620-639, and Vol. I, pp. 218-219, Lecture 37 and note to Lecture 5; Holmes' The Common Law, pp. 35-36; Holland on Jurisprudence (10th ed.), pp. 62-67.)

It also should be clear to the trained lawyer that judicial generalizations are not inherently dependable, for the reasons which I indicate in the principal text. If a doubter with clarity of vision makes a careful historical study of the decisions on almost any topic he will be convinced of the fact. (Austin's Jurisprudence, Vol. II, pp. 655-658, Lecture 39.) There are many expressions of generalizations in judicial opinions which are admirable indications of the law. The analyses, the comprehension of related questions and considerations, and the statements are adequate. They are reliable, however, not because they have been judicially announced, but because they will stand the test of use. "In fine," says Austin in the passage cited above, "we can never be absolutely certain (so far as I know) that any judiciary rule is good or valid law, and will certainly be followed by future judges in cases resembling the case by which it has been introduced. Here then is a cause of uncertainty which seems to be of the essence of judiciary law. For I am not aware of any contrivance by which the inconvenience could be obviated."

Undoubtedly judicial decisions make law and their multiplication tends to simplify the prediction of potential adjudications and the definite and certain generalization of the results; but a court has no legislative power to enact expression which is binding in other litigation. Its essential juridical function is to hear, supervise, and determine particular concrete controversies brought within its jurisdiction. (Compare Austin's Jurisprudence, Vol. II, pp. 621, Lecture 37.)

One has only to recall to mind the history of the decisions concerning the rule against perpetuities, liability for consequences of a legal default, trade and labor contests, contractual consideration, riparian rights, percolating waters, or appropriation of water in the western states and a sane, unbiased judgment will assure him that courts develop and settle the law by the slow process of reasoning out determinations of successive concrete decisions and not by promulgation of broad generalizations. (Austin's Jurisprudence, Vol. II, pp. 620-639, 657-658, Lectures 37 and 39; Sir Samuel Romilly on Codification, 29 Edinburgh Review, p. 331; See also Excursus by W. Jethro Brown in "The Austinian Theory of Law," p. 288. They do not dismiss cases because they can find no previously announced rule or principle to apply nor even because they cannot devise a satisfactory rule. Sometimes judges confess their inability to generalize certainly beyond the settlement of the particular case under consideration. Frequently their rules are

tentative, or are negatived by the course of later decisions, or are vague and indefinite. Over the devising of methods of adequately generalizing the law on some topics, jurists are still puzzled. For instance who will undertake to point out anywhere the expression of a system of accurate, definite, usable rules indicating the limitations set by the courts on liability for consequences of legal defaults? Certainly the make-shift broad generalities of the judges on this abstract question are not illuminating or dependable. Yet most of the cases are well determined and there is no extraordinary conflict or incoherency in the mass of concrete adjudications.

However, there is quite a strong political and academic prejudice against admitting that judges are or should be free in their law-making work, except insofar as legislation and the sound traditions and training of their profession control their reasoning. The theory of the threefold division of the powers of government in the fanciful form which allots to the legislature exclusively the power of making new authoritative governmental expression, to the courts only the power of determining and interpreting valid governmental expression, and to the executive the power of enforcing "the law," has emphasized and fortified this prejudice. It finds voice in the familiar dogma that a government should be one of laws and not of men. At its foundation lies, I believe, ignorance of the proper function of courts, of the nature, use, and difficulties of generalization, and of the limits of efficient abstraction and expression.

A government is necessarily composed of the concrete actions and conduct of men. Laws are only mental processes. Judges may follow precedent, tradition, legislation, custom, public opinion, their ideas of justice, or other considerations; but as long as courts are invested with the power to determine finally the disposition of cases within their jurisdictions, the judge's reasoning will determine the decisions and we cannot hope to devise a system of expressed rules and principles which will make this reasoning perfunctory and mechanical. (See 6 Har. Law Rev., pp. 32-33.) The infinite variety of circumstance and the continual readjustments of the forces and conditions of social life and of the particular purposes and ideals of its members discourage such a hope. No code has been devised which would dispense entirely with judicial discretion and turn the judge into an interpreter only. (Even Austin in his elaborate argument for codification admits this. See Jurisprudence, Vol. II, pp. 663-665, Lecture 39.)

Furthermore to require judicial reasoning to proceed always within the confines of promulgated rules and principles, will not prevent individual bias from affecting a decision. It could be demonstrated that judges are able to manipulate generalized expressions to suit their preferences as easily as they could plausibly justify the same decision by free reasoning. Indeed previous judicial and legislative expression may be misused as a plausible mask to conceal the real motives or the incapacity of the judge. On the other hand, if the judge and the people realize that within the barriers set by legislation he is law maker and not merely law interpreter, there is forced upon him the full dignity and the full responsibility of his position. No longer can he safely shirk. No longer can he hide incapacity behind the printed rules in the book upon which he uncertainly leans. He must justify his decision on grounds that appeal to the enlightened opinion of his profession or suffer criticism. He cannot shift the blame to the past utterance of fallacious generalities. He is not arbitrary because he must be reasonable or fail, and he will be directed by his training, and the ideals and traditions of his profession. Austin has well answered the usual distrustful objections to what he calls "judicial legislation" in Lecture 38 of his work on Jurisprudence, Vol. II, pp. 641-647.

Inconsistently with the prejudice of which I have spoken, society is demanding with increasing persistence and occasional scornful opprobrium that the legal profession exert its influence and energies for the betterment of the law and particularly that the judges adopt a theory and an attitude which will augment instead of retard its development to meet the changing demands of our social and economic organization. Easy as it is for the unintelligent and unprogressive minds of the profession to recline on the venerable fiction that judicial functions do not include innovation, but only determination, interpretation, and application of pre-existing rules and principles, neither the bar nor the bench can weather the rising storm on such a fragile raft. Courts cannot avoid making law in deciding cases. The people demand of them justice in litigation and they will blame the courts as the proximate cause if injustice is frequently meted out. If the unjust

If what I said concerning the authoritative force of judicial generalizations and the expression of them is comprehended it will become clear that abstract definitions of legal terms by judges are not of authoritative force. Definitions concern only the meanings of language. The definition given a word by a judge in his opinion tends to show the sense in which he uses it or in which he understands others to use it; and the definition is of force only for the purpose of interpreting what the author says and understanding his point of view. Sometimes the definition fails even to communicate accurately the author's use of a term. The denotations of some important common legal ideas are vaguely comprehended by most judges and lawyers and therefore their use of the terms employed to indicate these ideas are defined by them erroneously. In all cases any lawyer may define legal terms as he pleases for his purposes. As long as he makes himself easily, correctly, and economically understood in his use of them he is subject to no logical linguistic criticism. The usage of judges influences the common and accepted uses of words; but neither judges nor courts have any inherent authority over the abstract definition of legal terms. It may serve to obviate delay in the full acceptance of this statement to say that I do not intend to comprehend in it those processes of interpretive definition which judges undertake in order to pass upon the legal effects of a written instrument or of legislative expression involved in a suit before them.

Definitions of legal terms expressed through legislation are authoritative only insofar as it is expressed or implied that they are to be taken as guides in interpreting legislative expression or other external communication. The bare definition of a legal term by legislation without some such further provision expressed or implied, is of no inherent force.

There may be some who will contend against me that "the law" consists not of actual and potential governmental sequences nor of past judicial generalizations concerning such sequences, but of the accurate generalizations which may be induced to comprehend these sequences and therefore of rules and principles of law.[33] This

decisions cannot clearly be attributed to legislation, the censure of the people will not easily be escaped. The people are not interested in precedent. They have lost their primitive reverence for it. They are interested in justice, and a dogmatic adjudication that "this is the law as settled by precedent" will not tend to counteract a fast developing prejudice to judges as a class of public servants and to courts as institutions. Precedents have a logical limited weight as considerations in the administration of justice, but they should not be used to make or perpetuate bad law.

[33] "Judiciary law consists of rules, or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition, it is not law at all: And the judges who apply decided cases to the resolution of other cases, are not resolving the latter by any determinate law, but are deciding them arbitrarily"—Austin's Jurisprudence, Vol. II, p. 664, Lecture 39.

definition of the phrase conveniently may be regarded as an amendment of Austin's probable conception of the subject matter of judiciary law. I think that approximately Austin's subject matter of judiciary law would include only actual and potential generalizations of past cases and the considerations exclusive of legislation which produced them.

I at once agree that "the law" in the sense of the *science of law* largely will consist of accurate rules and principles concerning actual and potential concrete governmental sequences that that science or any part of it legitimately may be called "the law" abbreviately. I emphasize, however, the following facts.

1. The term so used does not denote the field of the lawyer's profession, but systematized *knowledge concerning that field.* The term is thus used in an additional distinct sense to denote an indefinite totality of systematized actual and potential knowledge or a part of that totality.

2. "The law" in this sense does not exist actually except insofar as systematized accurate knowledge of law is existing presently in the minds of persons. It "exists" potentially, however,—i. e. fictitiously—insofar as there is a possibility of minds entertaining such knowledge.

3. Much of the field of our profession never has been comprehended thoroughly in accurate rules and principles. Indeed it is a

I doubt that Austin meant by this passage that a judicial decision which is not based on a comprehended rule is arbitrary. (See note 23 supra.) Probably he meant only that decisions which cannot be brought into accord with rules obtained by induction are arbitrary. Seldon's often quoted dictum concerning equity and the chancellor's foot exhibits more augmentative cleverness than sound judgment. A decision may be based upon particular facts in the case without the formation or use of formal broad rules and will not be arbitrary if the judge is guided by balancing these particular considerations without prejudice or bias. Austin in Lecture 38, Jurisprudence, Vol. II, pp. 641-647 states some reasons why we need not fear arbitrariness in a judge's decisions although admittedly he "legislates" with some freedom. Austin's theory of the nature of "judiciary law" seems to be as follows: Judicial generalities are not safe guides. They may not be followed in decisions. Law, however, cannot consist of a mass of concrete decisions. Such a mass could not be law by hypothesis, since "law" is definable properly as something general. Therefore judiciary as well as statutory law must consist of rules or the decisions are arbitrary. The rules of which judiciary law is composed are not necessarily expressed in opinions, but are those which may be extracted by comparison of the decisions and their rationes decidendi. (See Jurisprudence, Vol. II, pp. 663-666; 620 639.)

The common view that the law is something general doubtlessly is colored by the facts that "laws" of any sort are general rules, that order, which the law connotes, is ordinarily associated with system and therefore abstract and general ideas, that legislative expression, to which modern minds independently of legal training instinctively turn as a familiar and normal type of "a law," is usually general in terms, and that it is natural to jump to the conclusion that "the law" is simply a name for the totality of a mass of "laws." If we had had two different terms to denote "the law" and "a law" or rule of law, such as "jus" and "lex" of Roman jurisprudence, the misleading influence of language might have been obviated; but there are other co-operating causes of the common confusion which probably suffice to produce it. These causes are familiar to intelligent students of the history of law, government, and philosophy.

useful hyperbole to say that only a relatively small fragment of it has been. In other words, the science of our law is still undeveloped.

4. "The law" in this sense has no authoritative form and there is no exclusive authoritative mode of expressing it. It may vary in mental forms within the bounds of flexibility of accurate human abstract thinking and its accurate expression may vary within the bounds of possible methods of accurate communication.

5. The expression of judicial generalizations is not necessarily an accurate indication of such knowledge and is not authoritative for reasons stated in this article.

Valid legislative expression is authoritative in the sense that courts and other governmental agencies are constrained to construe and give effect to it, but it is not independently an authoritative or necessarily accurate expression of those effects. They may be generalized into any accurate efficient forms and expressed in any accurate and efficient manner and the results will compose part of the science of law and its expression.

Briefly, thinking and communication in the field of law should be as free of artificial fetters as are the thinking and communication concerning any field of thought.

Among other things external to the official machinery of government which have an elemental force in the determination of law—that is in the determination of what concrete legal sequences follow from concrete causal conduct and conditions—custom has a prominent place. A custom consists of similar habitual sequences of occurrences external to the mind of the observer. It is not a formal authoritative thing like legislation. Its existence is not a part of organized government unless it is a governmental custom. It may affect legal sequences, however, in the same general way as legislation. It affects lawyers' problems because its existence induces a consideration which will weigh, and weigh heavily, in the deliberations of courts in cases upon which it has a relevant bearing. The potency of its influence is illustrative of a fundamental principle of good government:—that when no stronger considerations conflict, the wheels of society should not be forced from a smoothly worn groove. In earlier stages of society custom has an almost tyrannical force in government. The opposition to innovation grows varyingly less as civilization and wide spread intelligence increase, and therefore the coercive unreasoning force of custom in moulding the law tends to disappear. But custom and usage, within reasonable limits, are of great social utility in all ages, and therefore they will always continue to have an influence within limits which appeal to intelligent ideas of justice and governmental policy. Often positive injustice would be

done if courts did not consider customs or usages in deciding cases. Wherever customary ways of settling legal disputes out of court have been adopted by courts, we have a phenomenon which is closely related to the act of a court in following precedents.

It is not unusual to hear a certain custom spoken of not merely as a source of law, but as "the law." The explanation of this distinct application of the term is that the custom is a controlling consideration with the courts and therefore knowledge of the custom will enable us to predict future decisions within the scope of its influence. The custom guides the courts and guides us to foretell their action. For this reason it is labeled "law." In this respect this use of the word is similar to its use to designate rules of law. The two sorts of things indicated by these two uses are very different, however. A rule of law is a mental tool. Customs are similar habitual sequences of occurrences external to the mind of him who observes them and incapable of being entertained by his mind. They include mental operations of those who participate in the customary events, of course; but these mental operations are not part of the observer's process of deciding a legal problem. The custom guides directly through the judge giving weight to it as a controlling consideration and through our knowledge that he will do so. A rule of law guides through its use as an aid in thinking. This use of the word law must therefore be distinguished from the others which we have noticed.[34]

[34] See, however, and cf: Austin's Jurisprudence, Vol. I, p. 199; See also: Holland on Jurisprudence (10th ed.), pp. 54-61.

Another technical use of the word "law" should be perceived. I have noted its distinct uses to indicate the field of our professional study or a part thereof, a totality of thorough knowledge, actual and potential, of that field or a part of such a totality, a legal generalization, expression of such a generalization, legislative expression, its reiteration, and any custom which is potent as a consideration in the determination of cases. This other meaning sometimes attaches to the word in the antithetic phrases "questions of law" and "questions of fact."

If these phrases always had been used with comprehension and care, the division between the sorts of things denoted by them would be indicated by the following statement:

Questions which arise for solution by courts in litigation may be divided roughly into three general sorts. The first sort includes questions of what facts logically relevant to the litigation have occurred in the past and exist in the present and what pertinent consequences may be expected to flow from them in the future. The second sort includes questions of what concrete determinations concerning governmental consequences shall be made, and the weight and bearing of different considerations in the process of determination. The third sort includes questions concerning what procedure and routine shall be followed in the course of conducting the process of litigation before the court. The decision of questions of all three sorts is accomplished by human reasoning and therefore ordinarily through the use of abstractions and generalizations. Also the generalizations used with respect to a question of any of these sorts may or may not be of stereotyped, frequently used, and precedentially endorsed models. A clear and important technical distinction would be indicated by applying the phrase "questions of law" only to questions of the second and third sorts and the phrase "questions of fact" (and

impliedly "but not of law") to questions of the first sort. Questions of the second and third sorts concern the concrete purposes, policies, procedure, and juridical actions of the governmental law determining bodies. Questions of the first sort ask the ascertainment, conjecture, prediction, or assumption of some of those facts which are deemed necessary by the court as a prerequisite to a satisfactory determination of questions of the second and third classes.

Although the use of these terms is a mere matter of language, the use often is associated with a need for discriminating carefully between these different sorts of things and a loose, unconsidered usage tends naturally to obscure proper distinctions and to emphasize immaterial ones. It is unfortunate, therefore, that usage has not always been guided by clear and comprehensive analysis. Sometimes it has been influenced by an idea that only questions resolvable by an authoritative legal generalization are properly called "questions of law." See Salmond Jurisprudence, 2nd ed., pp. 9-22, and compare Austin's Jurisprudence, Vol. II, p. 664. Sometimes the historical division of the functions of judge and jury in actions at common law has befogged the usage, and questions to be settled by the judge, of whatever nature, have been denominated "questions of law," and questions which are submitted to the jury, of whatever nature, "questions of fact."

Professor J. B. Thayer, in his "A Preliminary Treatise on Evidence at the Common Law," Chapter V, instructively treats of this vague and confusing use of the word "law." One cannot read comprehendingly any of the writings of this master scholar and analyst without admiration for his clearness of discrimination and exposition. I would venture less confidently to differ from him with regard to his restricted use of the word "law" in its legal sense and the implied conception of the nature of the subject matter of legal study, if he had ever made a thorough, independent analysis of the problem of which this article treats, similar to his studies of topics of the law of evidence. He makes no pretense to such an analysis in the chapter to which I have referred, but takes for granted a partial definition of the word for the purpose of discussing the particular topic of the chapter.

No doubt judges often have endorsed by their language the common theory that the law is a mass of generalities, just as they have endorsed the more discredited but still vigorous superstition that judges only interpret law. The course of their decisions, however, will support neither theory. Difficult debatable questions of the concrete detailed definition of particular rights, duties, liberties, and powers often are determined by judges instead of being submitted to the triers of fact although no definite rule is available for decision of them. For instance questions of "legal causation"—the delimitation of the scope of legal liability—are generally so decided whenever there is no preliminary "question of fact" of my first class to be settled.

Questions of "reasonable use," of "legal negligence," and many others on which it is impossible to generalize definitely and expeditiously, involve "questions of law" according to my indicated definition of those words. Whenever all such "questions of law" are clearly predetermined abstractly by the judges and are stated in definite generalizations, leaving nothing to be done by the jury except an ascertainment of facts of the first of my sorts and a non-discretionary comparison with the definite generalizations communicated to them by the judges, the judgment of the jury is confined to "questions of fact" of my first sort; but whenever a "rule" is indicated to the jury which is not comprehensive and definite for the purposes of their work—such, for instance as the familiar "rules" of "reasonable use," "reasonable time," "natural and proximate cause,"—and the deficiency in detailed definiteness is not otherwise supplied, the jury is left to decide substantial "questions of law" of the second of my sorts. They do not simply interpret language and use the resulting definite guides, but necessarily they exercise judicial discretion, and either reason out their answers as do judges when some vague legislative expression is being "construed" and "applied," or grope their way with less understanding to a result. See also a note discussing this matter partially and in somewhat fictional language in 9 Col. Law Rev. at p. 154.

I have not attempted to catalogue all the technical meanings of this much discussed word. The variations which I have indicated, should satisfy my readers, however, of the error of attempting a universal technical definition or of basing a theory of law on

This finishes the partial outline of the field of our law which I purposed to present. I do not intend it as a comprehensive catalogue of the features of the field nor as an adequate description of any of them. My purpose has been only to give a point of view and to clarify certain realities and distinctions which I usually have found blurred in the minds of my students and of others with whom I have conversed on legal topics or whose writings I have read. Blurring of this sort is prejudicial to clear thinking on complicated problems of law, and hinders progress towards betterment of our jurisprudence.

A movement which portends changes in our administration of justice is gathering momentum all over the country. If this movement is to be directed and controlled towards true and permanent progress, the work must not be attacked in ignorance of the machinery and forces with which we are dealing; and if accomplishment is to satisfy our needs, the work should be done under the leadership of men who realize that the law is not an easy field of endeavor, and that desirable results cannot be won by the untrained. There is no more dangerous fallacy rampant in the popular mind than that the law is complex unnecessarily and that if it were not for lawyers, legal controversies might be determined easily, speedily, and justly. No art is more difficult than the art of good government and at the foundation of permanent good government must be laid the unavoidably difficult and intricate science of the law.[35] If those who realize this are to lead, it is necessary that they clear their minds of befogging superstitions, mystifying dogmas, and the treadmills of inadequate generalities and sophistical reasoning. They should direct their lawmaking efforts by comprehension of the purposes of good government, the needs of our people, and the experience of the past,[36] and should not be divorced from these guides by

such an attempt. When we consider that the forms and the substance of government have varied completely in different stages of human civilization, the fallacy of the definition theorists becomes even more emphasized. (Maine's Ancient Law, Pollock's ed., pp. 1-19; 389-394.)

[35] "I am far from thinking, that the law can ever be so condensed and simplified, that any considerable portion of the community may know the whole or much of it." Austin's Jurisprudence, Vol. II, p. 653, Lecture 39. This quotation is from the works of an ardent advocate of codification.

"It is not possible, indeed, for any fully developed body of law to be such that he who runs may read it. Being, as it is, the reflection within courts of justice of the complex facts of civilized existence, a very considerable degree of elaboration is inevitable." Salmond, Jurisprudence, 2nd ed., p. 25.

"* * * for I am fully convinced that only from enlightened and experienced lawyers is any substantial improvement of the law to be hoped for" * * * Austin's Jurisprudence, Vol. II, p. 681 (Lecture 39).

[36] "On the other hand, the conception of law as a means towards social ends, the loctrine that law exists to secure interests, social, public, and private, requires the jurist

a narrow interpretation of the learning of the books, heedlessness of popular judgment, or absorption in their private practices and pursuits. Progress in law reform is the work of the intelligent lawyer. If he shirks it, others will perform it less aptly and effectually. If he turns to it an open, inquiring mind and seeks the scientific thoroughness for which there is crying need, he will perform a great public service and rehabilitate his profession in the esteem of the people from which it is rapidly being divorced.[37]

Therefore I make this plea for greater emphasis on the thorough study of concrete facts of government, their causes, and their concrete effects and for subordination of generalization, definition, and verbal expression to their proper purposes. Widespread adequate understanding of the facts over which my argument has run would produce an increase in the efficiency of our legal education, a better comprehension of the high functions of the judicial office, and a consequent improvement of the administration of justice through more

to keep in touch with life. Wholly abstract considerations do not suffice to justify legal rules under such a theory. The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than one of furnishing self-sufficient premises from which rules are to be obtained by rigid deduction." Professor Roscoe Pound, 25 Harvard Law Rev., 146-147.

"* * * The lawyer who wishes to forecast the judicial interpretation of any problem that is not already covered by precise rule will be the more capable of doing so if he has learned to regard law, not as something existing in complete detachment from life, or as a mere beau chef d'oeuvre de logique, but rather as something which is being constantly reshaped by the facts of life, the thought and aspiration of men." * * * "The Austinian Theory of Law," W. Jethro Brown, pp. 376-377.

[37] To those who would raise the cry of "chaos" or "case-lawyer" or "judicial legislation" in protest against my theory I recommend careful cogitation over the following quotations:

"When we have escaped from the tyranny of mere forms, and have overcome the superstition that we must not regard things in their totality, when we have learned that, on the contrary, it is only when we so regard them we can hope to comprehend them, we shall find some place in legal theory for ideas which have already profoundly affected less conservative branches of learning. * * * It has been said of a great scientist that he closed the door of his laboratory before he entered the door of his church. The attitude is suggestive of the provisional order of things, since a theological theory which will not somehow square with the laboratory can afford no resting-place. Similarly a lawyer who leaves what he has learned from history and science behind him when he opens his Law Reports is merely postponing a difficulty. That difficulty will have to be met somehow. When it has been met, legal theory will not be the less, but the more, worthy of his homage." W. Jethro Brown, "The Austinian Theory of Law," p. 287.

"I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial and even absolutely necessary. I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." Austin's Jurisprudence, Vol. I, pp. 218-219.

uniformly enlightened and progressive decisions and careful, scientific legislation.[38]

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[38] One cannot go far in a discussion of the law without meeting the terms "right" and "duty." I have avoided them in this article partly because I wished to free the tenor of my argument from as many bye topics as possible, and partly because of the exigency of space. An exposition of some of the things commonly denoted by these terms in legal communication may be of interest to those who desire some further indication of my analysis of the law, however. Therefore I shall append a supplementary note covering the topic "The Nature of Legal Rights, Liberties, Duties, and Powers," which will appear in a later number of this Review.

At the beginning of an article which I contributed to the Columbia Law Review almost three years ago ("Some Suggestions Concerning Legal Cause at Common Law," 9 Col. Law Rev., 16, at pp. 17-23), I gave a very brief indication in nearly orthodox and figurative language of some of the principal views of the law which I have tried to explain in this article. My purpose was to clear the minds of my readers for my main theme by emphasizing three facts: (1) that the law does not consist of generalizations, (2) that rules and principles of law are only mental tools used in discussing and deciding legal problems, and (3) that sequences of legal phenomena are always concrete. I did not wish to weary my readers before we reached the main subject of that article by a thorough discussion of my theories nor to shock them into opposition by an abrupt and not fully explained departure from the ordinary views and language. I therefore adopted as far as was consistent with my purpose the common phraseology, and stated that "the law consists of concrete governmental dictates." This language is figurative. If it is interpreted literally, it is open to the same objections as validly may be advanced against the Austinian theory of law with the exception that I denied the general nature of the dictates. What I meant by the figurative language was that sequences of legal phenomena are necessarily concrete. If we figuratively conceive of law as consisting of commands, therefore, to make our fictitious conception of law tally with the truth, we must make the fictitious dictates concrete and detailed for all the situations requiring them as they arise. Valid legal generalizations of all sorts we may then regard as abstract indicatory guides to these fictitious concrete dictates which compose the law. If any of my readers find themselves unable to consent to my views as announced in this article because of a predilection for the Austinian theory of law, I commend to them the attempted adaptation of my views to that theory which I advanced in the article cited above. It will at least save him from the confusing error of conceiving of the law as a system of rules and principles.

This article has been written for common lawyers and the emphases and distinctions have been calculated for the needs of those who are professionally interested in the system of jurisprudence which prevails in most English speaking parts of the world. I do not feel competent to analyze and discuss fields of law in other countries even as sketchily and partially as I have our own. Some things, however, I can say with confidence on the basis of the slight knowledge which I have:

The matter of use of the word law in English or of partially analogous terms in other tongues is one only of language. The uses of these partially analogous words in other languages are not individually co-extensive with the legal uses of our word law, and to force any partially analogous words in different languages into exactly co-extensive meanings will necessarily result in arbitrary and useless definitions. Things of the nature of the different elements which I have described as existing in our field of law will be found under all advanced systems of law. My scheme of analysis with adaptations will answer for all such systems. We may find, however, for instance, that the courts of some countries do not weigh preceding cases as heavily as do ours or do not weigh them at all theoretically, and that they give to certain private texts a greater authority than is given by our courts to any similar writings. These facts, however, do not alter the nature of the things which I have mentioned, and my analysis in this respect could be copied in describing these other systems.